Washington State Supreme Court No. _____

No. 58544-4-I
Division One
Washington State Court Of Appeals

TANYA GREGOIRE, as guardian *ad litem* for BRIANNA ALEXANDRA GREGOIRE, and as PERSONAL REPRESENTATIVE FOR THE ESTATE OF EDWARD ALBERT GREGOIRE

Appellant,

vs.

CITY OF OAK HARBOR, a Municipal Corporation,

Respondent.

PETITION FOR REVIEW

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APPENDIX

I. Identity of Petitioner

Petitioner is Tanya Gregoire as guardian for the person and estate of Brianna Alexandra Gregoire, a minor, and as personal representative for Edward Albert Gregoire, deceased

II. Citation to Court of Appeals Decision—Denial of Motions for Publication and For Reconsideration

The Court of Appeals Division I entered its decision on October 29, 2007 affirming the jury's verdict of negligence but no proximate cause. Petitioners Motion for Reconsideration and Motion for Publication were denied on November 28, 2007

III. Issues Presented for Review

A.. In a jail suicide case, where the jury found the jail negligent in breach of the special relationship recognized by statute and by this court in Shea v. Spokane, 17 Wn. App, 236 (1977) affd 90 Wn 2d 43 (1978) and Christensen v Royal School Dist., 156 Wn 2d 62 (2005), did the trial court err by instructing the jury that the act of suicide would constitute an "assumption of the risk" and "contributory negligence".

B. In a jail suicide case involving the special relationship duty recognized by this court in Shea v. Spokane, 17 Wn. App. 236 (1977) affd 90 Wn 2d 43 (1978) and Christensen v Royal School Dist., 156 Wn 2d 62 (2005), did the trial court err by giving an instructions on proximate cause that negates the special relationship duty.

C. What is the evidentiary standard for review of a trial court's failure to question or dismiss a deliberating juror when confronted with incontrovertible evidence of both bias and of violation of the juror's oath during voir dire.

IV. Statement of the Case

"Why don't you just shoot me, please just shoot me CP 628

(Inquest p25 line 23) screams 23 year old Eddie Gregoire, an army

veteran, as he runs from police, out of the jail sally port, is tackled to the ground and is carried kicking and screaming into the city of Oak Harbor Jail where he is strapped into a restraint chair CP 628 Inquest p 24 .

Plaintiff Brianna Gregoire's father tried to commit "suicide by cop" by running from police out of an open sally port at the Oak Harbor Police Department Jail in handcuffs. He on his way to jail on minor misdemeanor warrants. He was transported in a State Trooper's patrol car as he had been a passenger in a car with open containers and had outstanding Oak Harbor city misdemeanor warrants CP 1005 lines 22-24

During the transport, something else unusual happened. Eddie started kicking the shield behind the front seat with his knee and began crying. He "hated his friends", used profanity and said "I take one step forward and my friends take me two steps back" CP 627 Inquest p 19 lines 2-4 , CP 626 Inquest p 17, lines 16-24, p. 8

The Trooper was at one point so concerned about Eddie that he asked for another officer to meet him at the jail. (CP 627), Inquest p. 21. Eddie was taken from the restraint chair with no receiving screening regarding his physical or mental condition, placed alone in a regular cell unobservable, with bed sheets and a solid metal grate over the bunk, readily available for him to hang himself. CP 656, Inquest pp 159-165.

Eddie is found hanging from that grate by a bed sheet only 25 or 30 minutes after he is left alone and unobserved. CP 659 Inquest p 177

line 5-11, CP 660 Inquest p 182, 183-184, CP 645 Inquest p108, which is **only about an hour** after he was wrestled to the ground as he ran from the jail begging to be shot. CP 643 Inquest p 99-100 CP 646, Inquest pp 109-117, CP 862 , Dep of Raymond Payeur p 47-50,CP 1430

After Eddie Gregoire is found hanging, no CPR is administered by the CPR trained officers of the City of Oak Harbor even though it had only been 5-10 minutes since Eddie Gregoire was seen standing by his bunk alive CP 646, Inquest pp 109-117, CP 862 , Dep of Raymond Payeur p 47-50,CP 1430

Petitioner excepted to Jury Instruction No. 6 regarding negligence, assumption of risk, and contributory negligence. Petitioner briefed the issue for the trial court and the court's review of that briefing is noted in the record. VRP 289, 290, 291, 303, 304. The court gave instructions consistent with the court's belief that the act of suicide "assumption of the risk" could be a complete bar to recovery and could completely "negate any duty that might be owed". VRP 304. The court spoke at length about the basis for that instruction at the end of Petitioner's exceptions. The court stated:

> Mr. Gregoire engaged in the unreasonable assumption of risk by hanging himself. The court should not overrule the legislative will by taking away a defense which is available under statutory law by judicial fiat.

VRP 320-321

The jury trial was held in Island County Superior Court in May, 2006. The jury, on instructions from the court CP 24-25 some of which were excepted to by Petitioner VRP 289-322, returned a special verdict form finding that the City of Oak Harbor was "negligent". (CP 24-25) However, Defendant argued and the court instructions ratified that Eddie's act of suicide relieved the City of its negligence, constituted an "assumption of the risk", contributory negligence, and an intervening intentional act, leaving the act of suicide as the only proximate cause of his death.[1] As instructed, the jury's second answer on the verdict form was inescapably a finding of no "proximate cause". This Petition is taken after the Court of Appeals denied a motion to publish and/or reconsider its decision affirming the jury verdict.

V. Argument

A. Review should be granted because of substantial public interest to clarify that the special relationship duty recognized in Shea v. Spokane and Christensen v. Royal School Dist. applies not only to school children but to citizens incarcerated on misdemeanor warrants who cannot protect themselves and as a result jury instructions on contributory negligence and assumption of the risk are error

1. Contributory Negligence

There are exceptional special relationships under the law. Sandborg v. Blue Earth County, 615 N.W. 2d 61, 64 (2000). In an

1 Jury Instruction 6, CP 32

exceptional relationship –as in Christensen v. Royal School Dist., 156 Wn.2d 62 (2005), and the case *sub judice*—there can be no comparative fault.

> "Custodial suicide is not an area that lends itself to comparative fault analysis. ---[T]he conduct of importance in this tort is the custodian's and not the decedent's.---[I]t is hard to conceive of assigning a percentage of fault to an act of suicide. The suicide can be viewed as entirely responsible for the harm, or not relevant at all to an assessment of a custodian's breach of duty. A comparative balance of 'fault' in a suicide case would seem to risk random 'all or nothing' results based on a given jury's predilections."

Sauders v. County of Steuben, 693 N.E. 2d 16, 20 (Ind. 1998).

> "... [W]here the jailer has a duty to protect a detainee from self-inflicted harm and fails to fulfill that duty, it does not make sense to offset the jailer's fault by comparing the decedent's fault for inflicting the harm that the jailer had the duty to prevent"

Id.

As with school children and inmates, a duty is imposed on the entity with the "special relationship". The *Restatement (Second) of Torts § 452* states that where a duty –in its entirety –has been shifted to a third person, the original actor is relieved of liability for the result that follows from the operation of his own negligence. "The shifted responsibility means in effect that the duty, or obligation, of the original actor in the matter has terminated, and has been replaced by that of the third person. Because the original actor is relieved of his duty in these extraordinary circumstances, he can have no fault to be compared." Sandborg v. Blue

Earth County, 615 N.W. 2d 61, 64 (2000); *Restatement (Second) of Torts § 452*,cmmt.d (1965).

In Sandborg the Supreme Court of Minnesota held that a jury should not determine, compare or apportion fault on the part of a detainee who committed suicide while in custody because of the duty owed to the detainee to protect him from self inflicted harm. 615 N.W. 2d at 65. The Supreme Court of Minnesota was clear to explain that this was not the imposition of strict liability as the plaintiff would still have to prove that the jail breached the reasonable standard of care that it owed to the detainee. *Id.* And in fact, the Island County jury in this case determined that the City of Oak Harbor did breach the standard of care regarding screening and incarcerating Mr. Gregoire.[2] The Island County jury returned a verdict of "Yes" on the question of whether the City was "negligent" as defined in the instructions. CP 21.

The Court's reasoning was also based, in part, on *Restatement (Second) of Torts § 449*, cmmt. b (1965).

> "The happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects

2 The jury entered a verdict that the City was negligent as to the following: (1) Failing to have a suicide prevention plan with procedures and training for its officers and jailers; (2) failing to have a written standard operating procedure for officers to book and screen new inmates coming to the jail and failing to conduct receiving screening of Mr. Gregoire; (3) admitting Mr. Gregoire to the Oak Habor City Jail rather than sending him to Whidbey General Hospital or the Island County Jail or some other appropriate facility; (4) placing Mr. Gregoire in a cell with a sheet and leaving him unobserved; and (5) failing to initiate CPR for Mr. Gregoire immediately, thereby reducing his chance of survival. Jury Instruction No.6. CP 32

> the actor to liability cannot relieve him from liability***To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity. "

615 N.W. 2d at 65.

In the case *sub judice* the duty was clear and was clearly assigned to the jail by statute and case law. The jury found that City of Oak Harbor violated its duties, but the trial court instructed the jury on comparative fault. Though there was a statutory duty to do receiving screening, and there was notice of behavior that warranted evaluation for suicide, Eddie Gregoire was placed alone and out of sight in an unmonitored cell with the obvious means to commit suicide. Under these circumstances, affording the City of Oak Harbor a defense of comparative fault thwarts the public policy which recognizes a high rate of impulsive jail suicides and mandates receiving screening and suicide prevention programs in jails. [3]

This reasoning of the Restatement and Sauders is in accordance with this Court's recognition in Christensen v. Royal School Dist., 156 Wn. 2d 62, 70 (2005) that the defense of contributory negligence should not be available to a school district where a student has a sexual relationship with a teacher because a school has a special relationship with students in its custody and a duty to protect them from reasonably

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3 WACs 289-20-105; 289-20-110; 289-20-130; Felthous, MD, *Bull Am Acad Psychiatry Law*, Vol 22, No. 4, 1994

anticipated dangers. As with the jail, the student's relationship with the school is mandatory, the school substituting as a parent; the jail taking total control of the detainee. This is an exceptional relationship where the defendant as a jailer cannot avail itself of comparing fault for the very conduct it was charged to prevent.

The relationship between a student and a school while similar to that of a detainee and a jail, is less legally compelling. A student can move about freely, go home, call for help, and leave the school at the end of the school day. But under the exceptional relationship between the detainee and the jail, the detainee is restrained and under the complete and total control of the jail twenty four hours a day. The jail system induces a human crisis, locks him away from every source a human might need to resist suicide during a mental health and legal crisis, isolated, locked away from family, counseling, health care, religious ministry, friends, familiar places, telephones, human contact, exercise and the like.

In Christensen the school district and the principal argued that their alleged negligence should be compared to the plaintiff student's conduct because the intentional conduct of the teacher was not relevant as to any negligence on their part. 156 Wn.2d at 70. This Court rejected this argument because "the District and [the principal's] failure to supervise and control [the teacher's] intentional conduct is central to [their] duty to protect [the student]"

Likewise the City of Oak Harbor had a duty to perform receiving screening, to have safe cells, to transfer Mr. Gregoire to an appropriate facility, to properly train it staff, to provide CPR and the other duties identified in Jury Instruction No. 6, to provide for Mr Gregoire's safety in custody, and thus no comparative fault charge is appropriate.

2. Assumption of the Risk

The trial court gave an instruction on "implied primary assumption of the risk". The trial court cited as authority in giving this charge Dorr v. Big Creek Wood Products, Inc., 84 Wn. App. 420, 927 P.2d 1148 (1996). Implied primary assumption of risk would require Plaintiff to be able to knowingly relieve Defendant of the duties to have safe procedures and cells.

In proper cases, the affirmative defense of implied primary assumption of the risk remains viable in Washington as a complete bar to a plaintiff's recovery, even after the adoption of comparative negligence Scott v. Pacific West Mountain Resort, 119 Wash.2d 484, 495-99, 834 P.2d 6 (1992). "Implied primary assumption of risk arises where a plaintiff has impliedly consented (often in advance of any negligence by defendant) to relieve defendant of a duty to plaintiff regarding specific known and appreciated risks". *Id.* at 497.

In Sauders v. County of Steuben, 693 N.E.2d 16 (Ind. Supt. Ct. 1998) the Supreme Court of Indiana held that "the act of suicide cannot

constitute . . . . incurred risk (assumption of the risk) in a custodian suicide case. Because the jury was instructed on . . . . incurred risk in such a manner as to bar claims, a new trial is required." *Id.* at 20. The Court stated that

> "under the instructions on contributory negligence and incurred risk, the jury could have based its result solely on the fact that the decedent killed himself. The instructions defined the two defenses in such a manner, that the act of suicide could be construed as meeting those definitions. The jury was also instructed that if it found that the act of suicide met the requirements of either defense, then the [plaintiff] could not recover. If the act of suicide (or attempted suicide) is a defense to a claim for failure to take reasonable steps to protect an inmate from harm the cause of action evaporates in any instance of suicide or attempted suicide. This would completely obliterate the custodian's legal duty to protect the detainee from harm. *Id.*

For implied primary assumption of the risk to be applicable one must conclude that Mr. Gregoire impliedly relieved the City of Oak Harbor of the statutory and common law duties of the City Jail, that he knowingly waived the "special relationship" duties owed to him. However, the jail's duties by statute include, mental health "receiving screening", "training in receiving screening", provision of Cardio Pulmonary Resuscitation and first aid.[4] Those simply could not be knowingly assumed by an untrained, suicidal and later comatose inmate. The legal fiction of such an assumption fails since Mr. Gregoire does not

4 WAC's 289-20-105; 289-20-110; 289-20-130. CP 1486-1489.

have the knowledge or capacity to choose the conditions of his incarceration, nor the training of his jailers. He is being held, against his will and without any ability to affect the conditions of his incarceration. A detainee cannot be deemed to assume the risk that statutory duties will not be carried out, that he will not be screened or monitored, that he will not receive mental health screening or care, that in a time of suicidal crisis he will be given the instruments of suicide and left alone to carry it out.

B. Review should be granted because of substantial public interest to clarify that the special duty relationship recognized in Christensen does not allow a jury instruction on proximate cause that negates the special duty relationship

The instruction initially given by the trial court stated that the term proximate cause means a "cause which in a direct sequence unbroken by any new independent cause" The jury then asked for a clearer definition of proximate cause and the court, over Plaintiff's objection, instructed "[a] cause of an event is a proximate cause if it is related to the event in two ways: (1) the cause produced the event in a direct sequence unbroken by any new independent cause, and (2) the event would not have happened in the absence of the cause. There may be more than one proximate cause of an event."

The problem is this instruction requires the jury to treat the suicide as an intervening act that breaks the chain of causation. By doing so the special relationship duty owed by the City of Oak Harbor is again

completely negated.

"If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortuous, or criminal does not prevent the actor from being liable for harm caused thereby." Restatement Torts, 2d, § 449, p. 482.

Therefore given the three WPI instruction choices for proximate cause, Plaintiff's requested instruction of WPI 15.2, [5] would allow the jurors to find liability if the City's negligence was a "substantial factor" in bringing about the suicide of Eddie Gregoire. WPI 15.2

C. Review should be granted to determine the evidentiary standard for review of a trial court's failure to question or dismiss a deliberating juror when confronted with incontrovertible evidence of bias and violation of the juror's oath to disclose bias

In this case there was a lengthy juror questionnaire with three (3) questions regarding suicide. In the jury questionnaire filled out **May 16, 2006** Prospective Juror No. 13 [seated Juror No. 5] at CP 128-130 answered 3 questions regarding his views on and connection to suicide. He was asked "Do you have strong feelings one way or the other about suicide?" with a request to explain the answer. He answered "NO" without explanation. CP 129

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[5] CP 13

However, in a blog on the internet written by him 17 days before trial on April 29, 2006, Juror No. 5 stated :

> **"I am really pissed off right now. I want to punch something and scream every cuss word I can think of. Yet here I sit at my laptop trying to figure out how I am going to handle all of these emotions" ; and**
>
> **"Last weekend was spent comforting, counseling, consoling and confronting hurtful and damaging theology concerning suicide that made a bad situation even worse."; and**
>
> **"This one hits close to home and I am tired of dealing with death"; and**
>
> **He stated "8 students in two years" had died.**

(CP 2179)

What brought the prior blog to the petitioners attorney's attention was discovery of Juror No. 5's blog **during** deliberation in which he stated: **"I still cannot talk about it, but later this week when I can, I am going to have lots and lots to say to you lawyers who keep coming to this blog everyday. That's right, I know.)** (CP 2177)

Juror 5 said nothing in response to intense and repeated questioning about emotions and beliefs about suicide in oral voir dire. RP 1-134. When the blog was brought to the court's attention during deliberations, and Petitioner specifically requested to interview or excuse Juror No. 5, the court refused. RP 1-134.

The oral voir dire is replete with questions by counsel for both Petitioner and counsel for the City of Oak Harbor regarding suicide:

> So in this case we have to talk about suicide and from the questionnaires its clear that we have very wide ranging views of suicide and what either has meant in our lives, many of us have experience with it, many of us have friends who have experience with it and we also have strong feelings about it from religious, teachings, philosophy, and legal approaches to it. So I would like to start the discussion about suicide by asking about—if there's anyone who could share a personal experience of someone you know of even in your own family – I know this is asking a lot of you to share—who could talk to us about an experience related to suicide or ways to prevent suicide?

VRP 95 lines 19-25, 96 lines 1-7)

> "I'm trying to get a general sense of whether the subject of suicide, which, obviously, is an unpleasant subject, and whether the subject of an autopsy associated with that and whether those subjects are going to cause anyone really some personal discomfort just for whatever in your life experience?

VRP 110 lines 13-18

> [**Beginning of Day 2 of Voir Dire**: Ms. Mann; What I would like to do -- is there anybody who had something to say or something that occurred to them overnight about the subject of suicide that they wanted to bring up? VPR 140:13-16 ..

Responses were many and showed juror's obligation to disclose any strong feelings or experience with suicide. [6:]

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6 Juror # 70 at 145 (second cousin jumped off Empire State Building) RP 145; Juror #38 (mother attempted suicide); Juror 52 (cousin who committed suicide)

Juror #47: "I had a student 2 years who committed suicide in the high school. I had him in class the day before. After class we were joking and then that night he committed suicide. So one of those cases, absolutely no warning from our standpoint as we talked to girlfriends, issues like that. They found out that some people were worried about him."

VRP 145-146.

Question: Now some of you in your questionnaires indicated that you have strong feelings about suicide as being something immoral or against religion or ethics. How many people have that kind of a feeling? I want to just get an idea.

VRP 149 lines 17-21

Question: Okay. And when we talk about suicide being a – something immoral or something that is a sin, for you does that imply that a person makes a conscious choice to take his life ?

VRP 150 lines 21-24

Question: Is there anyone else that still feels that suicide regardless of the circumstances would be sinful or immoral?

VRP p 152 lines 15-17

Question: ...[A]nyone who still holds a firm view that it is a choice that the person needs to be held accountable or that it is immoral?

VRP 143; Juror #58 (wife committed suicide after birth of child) VRP 147; Juror # 65 (sister in law committed suicide) VPR 144; Juror #5 (I feel disproportionate because of my feelings toward suicide and I just feel how could .... If he did... How can you reward a crime or you know, that's how I've been thinking since yesterday.") Juror No. 15: (Brother who committed suicide while he had a restraining order on him.) VRP 196; RP 195; Juror #43: (negative feelings about "I have strong feelings but there is a point where you can't hold the jail responsible for his actions..." VRP 189 – 195. [Prospective Juror #13 (Juror 5) did not respond]

VRP 155 lines 19-22

> Question: Is there anybody else who would have questions that would need to be answered in order to know how your religious feelings about suicide would impact your being a juror?

VRP 156 lines 21-24)

> Question: And if there was an impulse that clicks in as opposed to a conscious decision, how does that relate to whether it is a sin or immoral? Does that make a difference? Anybody have a feeling about that?

VRP 151 lines 13-17

> Question: How many here that mentioned an involvement with relatives or family members that committed suicide if you had known about it who here would have done something about it?

VRP p 180 lines 1-4

> Question: Is there anyone else who—I really appreciate you being candid with us about that –who would not be able to consider that someone other than the person who took their life in a jail could be responsible for that death? Is there anybody? Let me say it again.
>
> Question: Is there anybody who could not open their mind to the possibility that someone other than the person who took their life in a suicide could be responsible because of not having prevented it? Take a minute with that. It's okay. If you don't understand it, please ask me to clarify.

VRP 234 lines 4-15

> Question: Well, let me just ask it this way: Could you imagine that anyone other than the person themselves who takes their life in a jail could be responsible for anything that contributed to that suicide?

VRP 235 lines 9-13

> Is there anyone who is not able to consider that someone other than

the person who commits suicide could be responsible for that death?

VRP 238 lines 9-11

"One touchstone of a fair trial is an impartial trier of fact - 'a jury capable and willing to decide the case solely on the evidence before it.' " McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) (quoting Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)). Our federal and state constitutions provide that the right of trial by jury shall "be preserved" and "remain inviolate." U.S. CONST. amend. VII; WASH. CONST. art. I, § 21. "The right of trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." Smith v. Kent, 11 Wn. App. 439, 443, 523 P.2d 446 (1974). A juror's failure to speak during voir dire regarding a material fact can amount to juror misconduct. Allyn v. Boe, 87 Wn. App. 722, 729, 943 P.2d 364 (1997).

If a juror knows that disclosure is the appropriate response to the court's and/or counsels' questions, then bias is conclusively presumed. State v. Cho, 108 Wn. App.315, 328 (2001).. Whether the juror's bias actually affected the verdict is irrelevant. Allison v. Dep't of Labor & Indus., 66 Wn.2d 263, 265, 401 P.2d 982 (1965).

This court has determined that the proper evidentiary standard for an appellate court to review a trial courts dismissal of a deliberating juror

for unfitness under RCW 2.36.110 is de novo. State v. Elmore, 155 Wash. 2d 758 (2005). What has not been determined by this court is the evidentiary standard when the trial court is presented with uncontrovertible evidence of bias by a seated deliberating juror.

This Court has held that the appellate court "... must first determine the proper evidentiary standard that trial courts must apply when considering whether a juror is unfit to continue deliberating. The question of the appropriate standard of proof is a question of law, and our determination on review is de novo. *See, e.g.,* In re Det. of Petersen, 145 Wn.2d 789, 807-08, 42 P.3d 952 (2002) (Ireland, J., dissenting) (characterizing the question of the proper standard of proof as a question of law, subject to de novo review, and noting that the majority had analyzed the question de novo); *see* also Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 832, 100 P.3d 791 (2004) (questions of law reviewed de novo); Rozner v. City of Bellevue, 56 Wn. App 525, 536, 784 P.2d 537 (1990) ('The choice of standard {of proof} is an issue of law.'), rev'd on other grounds, Rozner v. City of Bellevue, 116 Wn.2d 342, 804 P.2d 24 (1991); In re D.T., 212 Ill. 2d 347, 818 N.E.2d 1214, 1220 (2004) (issue of proper standard of proof is a question of law subject to *de novo* review); Boccanfuso v. Connor, 89 Conn. App. 260, 873 A.2d 208, 224 (2005)." State v. Elmore, 155 Wn.2d 758, 768 (2005).

In cases that involve a juror's alleged concealment of bias, the test is "whether the movant can demonstrate that information a juror failed to disclose in voir dire was material, and also that a truthful disclosure would have provided a basis for a challenge for cause." State v. Cho, 108 Wn. App.315, 321 (2001). "[O]nly those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." McDonough, 464 U.S. at 556. *See* also In re Pers. Restraint of Lord, 123 Wn.2d 296, 313, 868 P.2d 835, clarified by 123 Wn.2d 737, 870 P.2d 964 (1994) ("Any misleading or false answers during voir dire require reversal only if accurate answers would have provided grounds for a challenge for cause.").

> "When the misconduct challenge is established during trial, and the applicable prejudice standard is met, the trial court may have several remedial options. If the misconduct affected only one or a very few jurors, and if alternative jurors are available, the jurors affected by the misconduct can be replaced."

5 WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE § 24.9(f), at 606 (1999) citing Perez v. Marshall, 119 F.3d 1422 (9th)

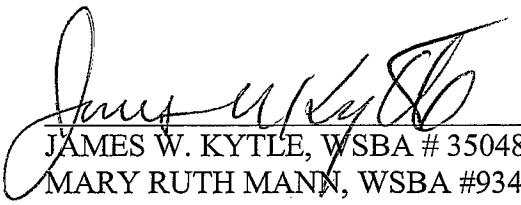
Conclusion

The City of Oak Harbor was negligent in incarceration of Brianna Gregoire's father resulting in his death. He died without assistance of trained staff, without mental health screening, without transfer to an appropriate facility, in an unsafe, "lethal" cell, and finally without basic

CPR, all missing due to the negligence of the City of Oak Harbor. This court cannot correct those errors, but it can correct the errors that denied her right to a fair jury trial where instructions virtually "directed" a verdict against her, and a defiant juror violated his oath and was not removed by the court. She asks the court to accept review and adopt proper legal standards for this case.

Respectfully submitted this 28 day of December, 2007.

MANN & KYTLE, PLLC



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APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

TANYA GREGOIRE, guardian for the person and estate of BRIANNA ALEXANDRA GREGOIRE, a minor, and as personal representative for EDWARD ALBERT GREGOIRE, deceased, Appellant, v. CITY OF OAK HARBOR, a municipal corporation, Respondent, RICHARD WALLACE, and his marital community; BENJAMIN SLAMAN, and his marital community; JOHN DYER, and his marital community; RAYMOND PAYEUR, and his marital community; STEVEN NORDSTRAND, and his marital community; and WILLIAM WILKIE, and his marital community, Defendants.	DIVISION ONE No. 58544-4-I UNPUBLISHED OPINION FILED: October 29, 2007

BAKER, J. — Edward Gregoire was found hanging in a jail cell at the Oak Harbor jail. An action for wrongful death and for state and federal constitutional violations was brought by Tanya Gregoire in her capacities as personal representative of decedent's

estate and guardian ad litem for Brianna Gregoire, decedent's minor child. The constitutional claims were dismissed on summary judgment. A jury found that the city of Oak Harbor was not liable for Gregoire's death. We affirm.

I.

Edward Gregoire was arrested on outstanding warrants and placed in the patrol car of State Trooper Harry Nelson for transport to the Oak Harbor jail. During transport, Gregoire kicked the shield separating the passenger compartment in the patrol car. Concerned that Gregoire might be violent, Trooper Nelson called dispatch to have another officer meet him at the jail. When they arrived, Trooper Wernecke was waiting. Nelson unbuckled Gregoire's seatbelt, and Gregoire stepped out of the vehicle. As Nelson bent down to pick up Gregoire's hat from inside the car, Gregoire attempted to run away. Nelson grabbed Gregoire's shirt, which tore as Gregoire tried to run. Gregoire fell to the ground, and Nelson and Wernecke restrained him. Oak Harbor Police Officer William Wilkie arrived to assist Nelson and Wernecke. Nelson asked Wilkie to get flex cuffs to restrain Gregoire's legs, because he was struggling and trying to run away. Wernecke struck Gregoire on the thigh with his baton to get Gregoire to stop kicking.

Inside the jail, Gregoire was placed into a restraint chair in a holding cell. Trooper Nelson and Trooper Wernecke left. Gregoire eventually calmed down, and removed himself from the restraint chair. Gregoire assured Officer Nordstrand that he would remain calm, and Nordstrand removed the flex cuffs from Gregoire's ankles. Gregoire was moved from the holding cell to a regular cell. Sometime later, Gregoire was observed crying in his cell. Approximately ten minutes later, Gregoire was found

hanging from a sheet, which was tied to the ventilation grate of the cell. The jailer attempted to call for help using the building intercom system and panic alarm. He ran to his desk to retrieve the key to open Gregoire's cell and a pair of scissors to cut the sheet.

Officer Slaman, Sergeant Dyer, Captain Wallace, and Detective Wilkie all responded to the alarm. Officer Slaman called for an ambulance on his radio. Slaman and Dyer checked for Gregoire's pulse, but observed no pulse or breathing. Captain Wallace decided not to initiate CPR. However, when paramedics arrived, they observed Gregoire's body was still warm, and administered CPR. After about 15 to 20 minutes, paramedics observed a faint carotid pulse. CPR was administered for approximately 25 minutes before taking him to the hospital. Emergency room doctors observed Gregoire was in a "premorbid state." Although resuscitative measures were attempted, Gregoire was pronounced dead shortly after arrival.

Tanya Gregoire originally brought federal civil rights claims and a state law wrongful death claim in the United States District Court for the Western District of Washington against Oak Harbor and the various jailers and officers who had dealt with Gregoire. That court granted summary judgment to all defendants regarding the federal civil rights claims, to Trooper Nelson and Trooper Wernecke regarding the state law claims, and declined to assert supplemental jurisdiction over state law claims against the remaining defendants.

Suit was brought in the superior court for Island County, alleging wrongful death, state constitutional claims, civil rights claims, and negligence. The trial court dismissed the federal claims based on res judicata and dismissed the state constitutional claims

for lack of a private cause of action. A jury trial was held on the state wrongful death claim. The jury found that Oak Harbor was negligent, but that its negligence was not a proximate cause of the death of Gregoire.

I.

Summary Judgment

Tanya Gregoire contends that the trial court erred when it granted summary judgment in part to Oak Harbor and other defendants. In reviewing an order for summary judgment, this court engages the same inquiry as the trial court.[1]

The trial court granted summary judgment to Oak Harbor regarding all federal civil rights claims and all Washington constitutional claims, reserving the remaining issues for a separate order. The trial court then issued a letter decision denying summary judgment to defendants on plaintiff's negligence claim.

Ms. Gregoire first brought this lawsuit in the United States District Court for the Western District of Washington. Judge Lasnik dismissed all federal claims with prejudice. Any federal claims relating to this matter were thereafter barred by the doctrine of res judicata. The trial court properly dismissed Ms. Gregoire's federal claims.

The trial court dismissed Ms. Gregoire's state constitutional claims because there is no private right of action for those claims. In her complaint, Ms. Gregoire asserted claims for violations of article I, section 3, 10 and 14 of the Washington Constitution. Ms. Gregoire cites no authority to support a damages action for such violations. Washington courts have consistently declined to judicially establish a cause

[1] Citizens for Responsible Wildlife Mgmt. v. State, 149 Wn.2d 622, 630, 71 P.3d 644 (2003) (citing Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

of action for damages based on constitutional violations without the aid of augmentative legislation.[2]

Ms. Gregoire argues that the cruel and unusual provisions of the Washington Constitution are more protective than the Eighth Amendment to the United States Constitution.[3] However, Ms. Gregoire does not explain why this entitles her to a private cause of action for those alleged violations. Ms. Gregoire cites Darrin v. Gould[4] for the proposition that individuals have standing to sue for state constitutional violations. However, Darrin was not an action for damages, but rather a suit to enjoin defendants from enforcing discriminatory rules and from interfering with the Darrin girls' participation on a school football team.[5]

Ms. Gregoire also incorrectly asserts that the trial court dismissed her claim of negligence based on violation of a duty to Gregoire. In fact, the trial court denied summary judgment to Oak Harbor regarding the negligence claim.

We affirm the trial court's ruling granting partial summary judgment.

Juror Bias

Ms. Gregoire contends that the trial court abused its discretion in failing to excuse prospective juror 12 for cause. A trial court's denial of a juror challenge for

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[2] Blinka v. Wash. State Bar Ass'n, 109 Wn. App. 575, 591, 36 P.3d 1094 (2001).

[3] Plaintiff cites State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980). Fain challenged his sentence based on Const. art. I, § 14. Our supreme court held that Fain's sentence was disproportionate to the seriousness of his crimes, and therefore cruel punishment in violation of Const. art. I, § 14. Fain was not an action for damages.

[4] 85 Wn.2d 859, 540 P.2d 882 (1975).

[5] Darrin, 85 Wn.2d 862.

cause is reviewed for manifest abuse of discretion,[6] with deference given to the trial court's decision regarding juror bias.[7]

Ms. Gregoire's argument is based on certain voir dire answers given by the juror: that she was sympathetic to law enforcement, would be "difficult to sway," and that she was "very over here right now," indicating the Oak Harbor table. However, the juror also indicated that she had "an open mind about everything," would "listen to everything," and that she could be fair and open-minded to both sides.

This court must take the evidence in the light most favorable to the prevailing party below, including deferring to the trial court's decision regarding the credibility of the prospective juror and the trial judge's choice of reasonable inferences.[8] Here, the juror indicated that she was able to be impartial. It was not an abuse of discretion to retain this juror.

Juror Misconduct

Ms. Gregoire contends that juror 5 should have been dismissed because he concealed a bias during voir dire. To obtain a new trial based on juror misconduct, Ms. Gregoire must demonstrate that juror 5 failed to disclose material information during voir dire, and that a truthful disclosure would have provided a basis for a challenge for cause.[9] A challenge for cause may be based on actual or implied bias.[10] A trial court's

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[6] State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991).
[7] Ottis v. Stevenson-Carson Sch. Dist. No. 303, 61 Wn. App. 747, 753-54, 812 P.2d 133 (1991).
[8] Ottis, 61 Wn. App. at 755-56.
[9] State v. Cho, 108 Wn. App. 315, 321, 30 P.3d 496 (2001).
[10] RCW 4.44.170(1), (2); RCW 4.44.180.

decision to deny a new trial will be disturbed only for a clear abuse of discretion or when it is predicated on an erroneous interpretation of the law.[11]

Counsel for Ms. Gregoire discovered a blog written by juror 5, in which he had written about his experiences dealing with suicide in his job as a youth minister. During jury deliberations, Ms. Gregoire brought the blog to the attention of the trial court and asked that the juror be excused, arguing that the blog was inconsistent with the juror's questionnaire. The juror had answered "no" to the question asking whether the prospective juror or any close friends or family members had ever been depressed or suicidal. A prospective juror is not obligated to volunteer information or provide answers to unasked questions.[12] The trial judge determined that the blog comments regarding his encounters with suicide in his work as a youth minister were not inconsistent with the juror's voir dire responses. Even if the juror had disclosed the information contained in his blog during voir dire, it would not have entitled Ms. Gregoire to a challenge for cause, because the information did not indicate bias. At most, the information would have given Ms. Gregoire reason to further question juror 5 during voir dire about his opinions regarding suicide.

The trial court's decision to retain juror 5 without interviewing him was not an abuse of discretion.

Jury Instructions

We review jury instructions de novo, and an instruction that contains an erroneous statement of law is reversible error where it prejudices a party.[13] Jury

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[11] Cho, 108 Wn. App. at 320.
[12] Cho, 108 Wn.App. at 327.
[13] Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000).

instructions are sufficient if they allow parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the law to be applied.[14]

Ms. Gregoire contends that the trial court failed to instruct the jury regarding a "special relationship," and that the trial court erred in giving instructions 9, 16, 18, 19, 20, and 21 regarding contributory negligence, comparative fault, and assumption of risk. She further contends that instruction 17 and answer to juror question 1 were incorrect statements of law regarding proximate cause, and that the court erred by not giving Gregoire's proposed proximate cause instruction, WPI 15.02.[15] We need not consider contributory negligence or comparative fault, because the jury did not reach those issues.

Ms. Gregoire argues that the trial court erred by not giving an instruction regarding a special relationship between jailer and inmate. The threshold determination in a negligence action is whether a duty of care is owed by the defendant to the plaintiff.[16] Under the public duty doctrine, a municipality is liable in tort only if it breaches a duty owed to the individual plaintiff, rather than to the public as a whole.[17] A special relationship establishes the existence of such a duty to the plaintiff. The custodial relationship between a jailer and an inmate is such a special relationship.[18] Here, the jury was instructed that Oak Harbor had a duty to Gregoire. Instruction 13 stated, "[t]he City of Oak Harbor, in operating and maintaining a holding facility or jail,

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[14] Cox, 141 Wn.2d at 442.
[15] 6 Washington Pattern Jury Instructions: Civil 15.02 (5th Ed. 2005) (WPI).
[16] Taylor v. Stevens County, 111 Wn.2d 159, 163, 759 P.2d 447 (1988).
[17] Taylor, 111 Wn.2d at 163.
[18] Caulfield v. Kitsap County, 108 Wn. App. 242, 255, 29 P.3d 738 (2001).

has a duty to provide for the mental and physical health and safety needs of persons locked in the jail." The jury was accurately informed of the applicable law.

Ms. Gregoire argues that where a special relationship creates an affirmative duty of care, assumption of risk does not apply. However, Ms. Gregoire does not cite any authority that supports this contention. Where no authority is cited, the court may assume that counsel, after diligent search, has found none.[19]

The court instructed the jury that "[a] person impliedly assumes a risk of harm, if that person knows of the specific risk associated with a course of conduct and/or an activity, understands its nature, voluntarily chooses to accept the risk by engaging in that conduct/activity, and impliedly consents to relieve the defendant of a duty of care owed to the person in relation to the specific risk." Ms. Gregoire does not contend that this is an inaccurate statement of the law regarding assumption of risk, and she has not provided authority for her contention that the instruction should not have been given.

Ms. Gregoire argues that Oak Harbor presented no evidence that Gregoire made a knowing, understanding, and conscious decision to relieve Oak Harbor of its duty. However, whether Gregoire had the requisite knowledge and whether his conduct was voluntary are questions for the jury, unless reasonable minds could not differ.[20] The evidence presented in this case is not part of the record on appeal. Thus, there is no basis in the record for this court to reverse for insufficiency of the evidence.

Next, Ms. Gregoire contends that the court erred in instructing the jury regarding proximate cause. The court's instructions regarding proximate cause included WPI

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[19] State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

[20] Egan v. Cauble, 92 Wn. App. 372, 377-78, 966 P.2d 362 (1998).

15.01 in the jury instructions, and WPI 15.01.01 in response to a jury question. Ms. Gregoire argues that, when read in context with the other instructions, these instructions set up the suicide itself as a barrier to finding proximate cause. Ms. Gregoire claims "[n]o jail can be unaware of the risk of jail suicide." However, whether a risk is foreseeable is a question for the jury.[21] Ms. Gregoire had an opportunity at trial to argue that the suicide was foreseeable.

Ms. Gregoire also argues that the proximate cause instruction she proposed, WPI 15.02, was more appropriate than the given instruction. However, the trial court determined that, based on the facts of this case, WPI 15.02 was not appropriate. This court is not in a position to second-guess the trial court's interpretation of facts, especially where the evidence presented at trial is not part of the record. The instructions were a proper statement of the law and did not prevent the jury from finding proximate cause.

The jury instructions properly stated the law, were not misleading, and allowed Ms. Gregoire to argue her case. The jury was instructed that Oak Harbor had a duty to provide for the health and safety needs of persons locked in its jail. The instructions correctly informed the jury of the law regarding assumption of risk and proximate cause.

We affirm the trial court's jury instructions.

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[21] Hunt v. King County, 4 Wn. App. 14, 20, 481 P.2d 593 (1971).

Motion in Limine

Ms. Gregoire assigns error to the trial court's denial of her motion in limine to exclude evidence and argument relating to "contributory fault." Ms. Gregoire provides no argument or authority regarding this assignment of error, other than her arguments regarding the alleged errors in the jury instructions, where she claims that contributory negligence does not apply in this case. Whether a plaintiff is capable of exercising reasonable care for contributory negligence is a question of fact for the jury.[22] It was not an error of law for the trial court to allow evidence relating to contributory negligence.

We affirm the trial court's denial of the motion in limine regarding contributory fault.

AFFIRMED.

Baker, J.

WE CONCUR:

Agid, J.

Coleman, J.

[22] Hunt, 4 Wn. App. at 25-26.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

TANYA GREGOIRE, guardian for the person and estate of BRIANNA ALEXANDRA GREGOIRE, a minor, and as personal representative for EDWARD ALBERT GREGOIRE, deceased,

Appellant,

v.

CITY OF OAK HARBOR, a municipal corporation,

Respondent,

RICHARD WALLACE, and his marital community; BENJAMIN SLAMAN, and his marital community; JOHN DYER, and his marital community; RAYMOND PAYEUR, and his marital community; STEVEN NORDSTRAND, and his marital community; and WILLIAM WILKIE, and his marital community,

Defendants.

DIVISION ONE

No. 58544-4-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 28th day of November, 2007.

FOR THE COURT:

Judge

APPENDIX OF STATE LAWS AND ADMINISTRATIVE CODES

RCW 70.48.071 Standards for operation--Adoption by units of local government.

All units of local government that own or operate adult correctional facilities shall, individually or collectively, adopt standards for the operation of those facilities no later than January 1, 1988. Cities and towns shall adopt the standards after considering guidelines established collectively by the cities and towns of the state; counties shall adopt the standards after considering guidelines established collectively by the counties of the state. These standards shall be the minimums necessary to meet federal and state constitutional requirements relating to health, safety, and welfare of inmates and staff, and specific state and federal statutory requirements, and to provide for the public's health, safety, and welfare. Local correctional facilities shall be operated in accordance with these standards.

[1987 c 462 § 17.]Effective dates--1987 c 462:

RCW 70.48.130 Emergency or necessary medical and health care for confined persons--Reimbursement procedures-- Conditions--Limitations.

It is the intent of the legislature that all jail inmates receive appropriate and cost-effective emergency and necessary medical care.

RCW 70.48.020 Definitions.

As used in this chapter the words and phrases in this section shall have the meanings indicated unless the context clearly requires otherwise.

(1) "Holding facility" means a facility operated by a governing unit primarily designed, staffed, and used for the temporary housing of adult persons charged with a criminal offense prior to trial or sentencing and for the temporary housing of such persons during or after trial and/or sentencing, but in no instance shall the housing exceed thirty days.

(2) "Detention facility" means a facility operated by a governing unit primarily designed, staffed, and used for the temporary housing of adult persons charged with a criminal offense prior to trial or sentencing and for the housing of adult persons for purposes of punishment and correction after sentencing or persons serving terms not to exceed ninety days.

RCW 46.61.502 or 46.61.504.

(4) "Correctional facility" means a facility operated by a governing unit primarily designed, staffed, and used for the housing of adult persons serving terms not exceeding one year for the purposes of punishment, correction, and rehabilitation following conviction of a criminal offense

(5) "Jail" means any holding, detention, special detention, or correctional facility as defined in this section.

(6) "Health care" means preventive, diagnostic, and rehabilitative services provided by licensed health care professionals and/or facilities; such care to include providing prescription drugs where indicated.

WAC 246-976-001 Purpose. The purpose of these rules is to implement RCW 18.71.200 through 18.71.215, and chapters 18.73 and 70.168 RCW; and those sections of chapter 70.24 RCW relating to EMS/TC personnel and services. (1) This chapter establishes criteria for: (a) Training and certification of basic, intermediate and advanced life support technicians; (b) Licensure and inspection of ambulance and aid services; (c) Verification of prehospital trauma services; (d) Development and operation of a statewide trauma registry; (e) The designation process and operating requirements for designated trauma care services; (f) A statewide **emergency medical** communication system; (g) Administration of the statewide EMS/TC system. (3) This chapter does not contain detailed procedures to implement the state EMS/TC system. Request procedures, guidelines, or any publications referred to in this chapter from the Office of **Emergency Medical** and Trauma Prevention, Department of Health, Olympia, WA 98504-7853 or on the internet at www.doh.wa.gov.

[Statutory Authority: Chapters 18.71, 18.73, and 70.168 RCW. 00-08-102, § 246-976-001, filed 4/5/00, effective 5/6/00. Statutory Authority: RCW 43.70.040 and chapters 18.71, 18.73 and 70.168 RCW. 93-01-148 (Order 323), § 246-976-001, filed 12/23/92, effective 1/23/93.]

Chapter 289-20 CUSTODIAL CARE STANDARDS--HEALTH AND WELFARE

Last Update: 2/3/82

Sections

289-20-150 Health care records. (Holding facilities.)

289-20-160 Special medical issues. (Holding facilities.)

289-20-165 Access to facilities. (Holding facilities.)

289-20-170 Food. (Holding facilities.)

289-20-180 Clothing, bedding and personal items. (Holding facilities.)

289-20-190 Sanitation. (Holding facilities.)

289-20-200 Responsible physician and licensed staff. (Detention and correctional facilities.)

289-20-205 Health care policies and procedures. (Detention and correctional facilities.)

289-20-210 Health screening. (Detention and correctional facilities.)

289-20-220 Access to health care. (Detention and correctional facilities.)

289-20-230 Health care training. (Detention and correctional facilities.)

289-20-240 Medications control. (Detention and correctional facilities.)

289-20-250 Health care records. (Detention and correctional facilities.)

289-20-260 Special medical issues. (Detention and correctional facilities.)

289-20-265 Access to facilities. (Detention and correctional facilities.)

289-20-270 Food. (Detention and correctional facilities.)

289-20-280 Clothing, bedding and personal items.

(Detention and correctional facilities.)

289-20-290 Sanitation. (Detention and correctional facilities.)

WAC 289-20-105 Health care policies and procedures. (Holding facilities.)

Written standard operating procedures shall consist of but not be limited to the following: (1) Receiving screening; (2) Nonemergency medical services; (3) Deciding the emergency nature of illness or injury; (4) First aid; (5) Notification of next of kin or legal guardian in case of serious illness, injury or death; (6) Screening, referral and care of mentally ill and retarded inmates, and prisoners under the influence of alcohol and other drugs; (7) Detoxification procedures; and (8) Pharmaceuticals.

WAC 289-20-100 Written procedures for medical services. (Holding facilities.)

(1) There shall be on file, in the jail, a written procedure which provides that necessary medical services will be provided twenty-four hours a day by one or more of the following: (a) A licensed physician. (b) A health care professional supervised by a licensed physician. (c) A hospital or clinic. (2) Security. All providers of medical services in holding facilities shall observe the security regulations which apply to jail personnel.

(3) Licensing and certifications. Medical services shall be provided only by licensed or certified health care providers.

[Statutory Authority: Chapter 70.48 RCW. 81-08-014 (Order 13), § 289-20-100, filed 3/24/81.]

WAC 289-20-110 Health screening. (Holding facilities.)

(1) Receiving screening shall be performed on all prisoners upon admission to the facility, and the findings recorded on a printed screening form. (2) If the results of receiving screening indicate a medical problem that may be detrimental to the health or safety of the prisoner, but is of a nonemergency nature, then the prisoner shall be seen within a reasonable time by a physician or nurse to determine the need for further diagnosis or treatment.

[Statutory Authority: Chapter 70.48 RCW. 81-08-014 (Order 13), § 289-20-110, filed 3/24/81.]

WAC 289-20-120 Access to health care. (Holding facilities.)

(1) Written procedures for gaining access to medical services shall be given to each prisoner at the time of admission and/or posted conspicuously in the jail. (30 day, 72 hour) (6 hour - WAC 28920-120(1) ADVISORY) (2) Prisoner complaints of injury or illness, or staff observations of such shall be acted upon by staff as soon as reasonably possible. Prisoners shall be provided with medical diagnosis or treatment as necessary.

WAC 289-20-130 Health care training. (Holding facilities.)

(1) Jail personnel shall be trained in standard first-aid equivalent to that defined by the American Red Cross and usual emergency care procedures prior to employment or during the probationary period. Written standard operating procedures and training of staff shall include but not be limited to: (a) Awareness of potential medical emergency situations; (b) Notification or observation-determination that a medical emergency is in progress; (c) First aid and resuscitation; (d) Call for help; and (e) Transfer to appropriate medical provider. (2) At least one person per shift shall have training in receiving screening. (3) At least one person available per shift shall have training in basic life support cardiopulmonary resuscitation (CPR). (4) All persons delivering medication shall be properly trained.

[Statutory Authority: Chapter 70.48 RCW. 81-08-014 (Order 13), § 289-20-130, filed 3/24/81.]

WAC 289-20-150 Health care records. (Holding facilities.)

(1) Prisoner file maintenance. (a) Prisoner medical files shall contain the completed receiving screening form, all findings, diagnoses, treatments, dispositions, prescriptions and administration of medications, notes concerning patient education, notations of place, date and time of medical encounters and terminations of treatment from long term or serious medical or psychiatric treatment, if applicable. (30 day) (b) A record of the date, time, place and name of the health care provider shall be retained on file at the jail if any health care services are provided to prisoners. (72 hour, 6 hour) (2) Prisoner file confidentiality. (a) Medical records shall be maintained separately from other jail records to the extent necessary to protect their confidentiality. (b) Medical records shall not be released to other persons or agencies without the written authorization of the prisoner. (3) The responsible physician or medical care provider shall communicate information obtained in the course of medical screening and care to jail authorities when necessary for the protection of the welfare of the prisoner or other prisoners, management of the jail, or maintenance of jail security and order. (30 day) (4) Information regarding known serious health problems shall be communicated to any transferring officer or receiving jail or correctional institution at the time of transfer. (72 hour, 6 hour) (5) The person delivering medications shall record the actual date and time of the delivery.

[Statutory Authority: Chapter 70.48 RCW. 81-08-014 (Order 13), § 289-20-150, filed 3/24/81.] WAC 289-20-120 Access to health care. (Holding facilities.)

WAC 289-20-210 Health screening. (Detention and correctional facilities.)

(1) Receiving screening shall be performed on all prisoners upon admission to the facility before being placed in the general population or housing area, and the findings recorded on a printed screening form approved by the jail commission. The screening shall include inquiry into: (a) Current illnesses and health problems including those specific to women; (b) Medications taken and special health requirements; (c) Screening of other health problems designated by the responsible physician; (d) Behavioral observation, including state of consciousness and mental status; (e) Notation of body deformities, trauma markings, bruises, lesions, ease of movement, jaundice, and other physical characteristics; (f) Condition of skin and body orifices, including rashes and infestations; and (g) Disposition/referral of inmates to qualified medical personnel on an emergency basis. (2) The health appraisal data collection should be completed for each prisoner within fourteen days after admission to the facility in accordance with the adopted standard operating procedures: Provided, That this subsection does not apply to prisoners who are able to receive medical care in the community. WAC 289-20-210(2) ADVISORY (3) Such health appraisal should include,

at a minimum, a physical assessment by a licensed health care provider, recording of vital signs and a general review of mental status: Provided, That such appraisal is not intended to be a standard "annual physical" but rather such minimum physical and mental status review as is necessary to detect any major problems. As appropriate, laboratory and diagnostic tests to detect communicable disease, including venereal diseases and tuberculosis, and other tests and appraisals should be included within such appraisal. WAC 289-20-210(3) ADVISORY (4) Health history and vital signs should be collected by medically trained or qualified medical personnel who are properly licensed, registered or certified as appropriate to their qualifications to practice. Collections of all other health appraisal data should be performed only by qualified medical personnel. Review of the results of the medical examination, tests, and identification of problems should be made by a physician or designated qualified medical personnel. All health appraisal data should be recorded on the health data forms approved by the responsible physician. WAC 289-20-210(4) ADVISORY.

[Statutory Authority: RCW 70.48.050(1) and 70.48.070(4). 82-04-088 (Order 22), § 289-20-210, filed 2/3/82. Statutory Authority: Chapter 70.48 RCW. 81-07-057 (Order 10), § 289-20-210, filed 3/18/81.]

WAC 289-20-230 Health care training. (Detention and correctional facilities.)

(1) Jail personnel shall be trained in standard first-aid equivalent to that defined by the American Red Cross and usual emergency care procedures prior to employment or during the probationary period. Written standard operating procedures and training of staff shall incorporate the following steps: (a) Awareness of potential medical emergency situations; (b) Notification or observation determination that a medical emergency is in progress; (c) "First aid" and resuscitation; (d) Call for help; and (e) Transfer to appropriate medical provider. (2) At least one person per shift within sight or sound of the prisoner shall have training in receiving screening and basic life support cardiopulmonary resuscitation (CPR). (3) Jail personnel shall be given training in symptoms of mental illness and retardation. (4) All persons responsible for the delivery of medications shall have training regarding the medical, security, and legal aspects of such activity.

[Statutory Authority: Chapter 70.48 RCW. 81-07-057 (Order 10), § 289-20-230, filed 3/18/81.]

Supreme Court No. _____

Division One, No. 58544-4-I
Washington State Court Of Appeals

TANYA GREGOIRE, as guardian *ad litem* for BRIANNA ALEXANDRA GREGOIRE, and as PERSONAL REPRESENTATIVE FOR THE ESTATE OF EDWARD ALBERT GREGOIRE	)	**CERTIFICATE OF SERVICE OF PETITION FOR REVIEW**
Appellant,	)	
vs.	)	
CITY OF OAK HARBOR, a Municipal Corporation,	)	
Respondent.	)	

I, Linda H. Anderson, declare: I am a legal assistant for Mann & Kytle, PLLC, I am of legal age and in all manners qualified to testify hereto. On this, the 28th day of December, 2007, I served, *via* ABC Legal Messengers, Inc., Appellant's Petition for Review and this Certificate of Service, on opposing counsel, as follows:

Robert Christie
Christie Law Group
2100 Westlake Avenue N., Suite 206
Seattle, WA 98109.

I Declare Under Penalty Of Perjury Pursuant To The Laws Of The State Of Washington That The Statements Herein Are True And Correct.

Dated this 28th day of December, 2007, at Seattle Washington.

Linda H. Anderson

Linda Anderson, Legal Assistant

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